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No. 81-5321

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

EARL ENMUND,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION

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QUESTION PRESENTED

Whether the Eighth and Fourteenth Amendments allow a criminal to avoid a capital sentence imposed under constitutionally valid State laws when he has planned and participated in a violent crime, supplied at least one of the deadly weapons used to execute the crime, and disposed of the weapons in an attempt to avoid detection after two brutal murders occurred as the natural and probable consequence of his criminal plan?

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INTERESTS OF *AMICUS CURIAE* WASHINGTON LEGAL FOUNDATION

The Washington Legal Foundation (WLF or Foundation) is a non-profit corporation organized and existing under the laws of the District of Columbia for the purpose of engaging in matters affecting the broad public interest. WLF has more than 80,000 members and supporters throughout the United States whose interests the Foundation represents.

WLF participates and devotes a substantial portion of its resources to matters raising criminal justice and related constitutional issues. The Foundation's concern for

the physical, psychological, and financial impact crime has on its victims, their families, and society has led to the establishment of a Crime Victims Program. This program is designed to advance the rights of crime victims and to help reduce the alarming crime rate in America. Among other activities, WLF provides educational materials, legal guidance, and assistance to the victims of violent crime, participates in rulemaking proceedings before such agencies as the United States Parole Commission, and monitors criminal cases in which the courts have been too lenient in sentencing violent criminals or otherwise exhibited an insensitivity to the rights of victims and the general public.

In the instant case, the Washington Legal Foundation seeks to advance the interests of its members and the public by urging this Court to consider the right and the need of the States and their elected representatives to protect law-abiding citizens from murders and other acts of violence which often lead to murder. The States have a paramount right to determine their individual criminal justice needs and how to best meet those needs without undue interference from Federal Courts.

The Washington Legal Foundation has appeared before this Court as *amicus curiae* on numerous occasions. Briefs *amicus curiae* have been filed with and accepted by the Supreme Court in the following recent cases: *Zant v. Stephens*, No. 81-89 (brief filed November 19, 1981); *Murphy v. Hunt*, No. 80-2165 (brief filed November 19, 1981); *General Bldg. Contractors Assn. v. Commonwealth of Pennsylvania*, No. 81-280, 330-33 (brief filed December 3, 1981; *Eddings v. Oklahoma*, No. 80-5727 (brief filed August 12, 1981); *Edwards v. United States*, No. 81-5017 (brief filed September 2, 1981); *Williams v. Zbaraz*, 448 U.S. 358 (1980); *Consolidated Edison Co. of New York v. Public Service Commission of the State of New York*, 447 U.S. 530 (1980); *United Steel Workers v. Weber*,

443 U.S. 193 (1979); *Carbon Fuels Company v. United Mine Workers*, 442 U.S. 939 (1979); *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 322 (1979); *Parklane Hosiery Co. v. Shore*, 439 U.S. 323 (1979); *Federal Trade Commission v. Standard Oil Co. of California*, 449 U.S. 232 (1980); *San Diego Gas and Electric Co. v. City of San Diego*, —— U.S. ——, 101 S.Ct. 1287 (1981); *Rostker v. Goldberg*, —— U.S. ——, 101 S.Ct. 2646 (1981); *Moody v. Forresster*, —— U.S. ——, 101 S.Ct. 1733 (1981); *First National Maintenance Corp v. NLRB*, —— U.S. ——, 101 S.Ct. 1510 (1981).

The Washington Legal Foundation can bring a perspective to this case which will assist the Court in obtaining full consideration of the public interest issues. WLF seeks to insure that the arguments in favor of capital punishment—which we submit more accurately reflect the real public interest since they consider the rights of *all* citizens, not just criminals—are advanced before this Court. Such a function is particularly important when, as here, a criminal who was a prime mover in a violent crime which foreseeably resulted in a brutal double murder seeks to avoid moral culpability and criminal responsibility. Petitioner asks this Court to override the authority of the State to determine the appropriate punishment for his crime as well as to substitute its personal judgment on factual matters for that of the courts and jury below. Such interference will only serve to undermine the rightful authority of the States and the confidence of the public in the criminal justice system.

STATEMENT OF THE CASE

In the interests of judicial economy, *amicus curiae*, Washington Legal Foundation, adopts for the most part the recitation of facts in the Florida Supreme Court's decision in *Enmund v. Florida*, 399 So.2d 1362, 1363-67 (1981). However, it is useful to briefly recount the facts

which are particularly material to the substantive issue at bar.

On the morning of April 1, 1975, the bullet-riddled bodies of Thomas and Eunice Kersey were found on the floor of their Florida home by their daughter. Mr. Kersey had been shot twice, while Mrs. Kersey had been shot six times.

A chain of evidence linked Petitioner, Earl Enmund, his common law wife, his son-in-law and his daughter-in-law to the crime. The evidence indicated that shortly before the murders, Petitioner and a friend bought a calf from Mr. Kersey who indiscriminately showed his wallet to Earl Enmund. According to testimony by Petitioner's wife, Enmund decided to plan to rob Mr. Kersey after seeing his money.

Further evidence adduced at trial demonstrated that a careful ruse for gaining access to the Kerseys' home was devised. It included the use of two deadly firearms. While the trial court found that it was reasonable to conclude that Enmund had fired into the bodies of the Kerseys, the Supreme Court of Florida ruled that no direct evidence was introduced at trial to show that Enmund had done so.

After the murders, Enmund instructed his wife to remove a .22 caliber pistol from a hiding place in their house. The pistol had formerly been in the glove compartment of the car identified as that driven to the robbery by Petitioner. Petitioner and his son-in-law instructed Enmund's wife to get rid of the guns since they had been used to kill Mr. and Mrs. Kersey.

At trial, Petitioner claimed he was innocent of robbing and murdering the Kerseys. Nonetheless, he and his son-in-law were tried and convicted of first degree murder and robbery. Pursuant to Florida law, evidence was heard on the sentencing issue and a sentence of death was recommended. The trial court specifically considered seven

mitigating circumstances, including Petitioner's degree of participation in the crime, and concluded they were outweighed by the aggravating circumstances present in the case.

The Florida Supreme Court reviewed a variety of claims advanced by Petitioner on appeal. The court concluded after independently examining all of the evidence that Petitioner's participation in the crime was "major" and that his conviction and sentence were correct under well-established Florida law.

SUMMARY OF ARGUMENT

Petitioner's capital sentence is neither excessive nor disproportionate under the Eighth and Fourteenth Amendments. Nothing in this Court's prior jurisprudence supports Petitioner's argument that a death sentence may not be constitutionally imposed in *any* felony murder case absent a finding of specific intent to kill. Since the jury and courts below considered all of the circumstances of the homicidal act and of Enmund's role in the felony in making their sentencing decision, Petitioner was treated as a unique individual in accordance with this Court's prior mandates. Thus, Petitioner's sentence must be affirmed even if individual members of this Court disagree with the assessment of the evidence reached below.

Petitioner would have this Court believe that an affirmance of the Florida court's decision would automatically mean that *all* participants in a felony murder, regardless of their intent or role in the crime, would receive capital punishment. The fact is that the Florida law expressly allows as a mitigating factor for capital punishment an accomplice's "relatively minor" participation in the felony. Fla. Stat. Ann. § 921.141(6)(d).

Petitioner, however, played a *major* role in the deaths of the Kerseys. His attorneys' characterization of his

conduct ("unintentional" and "lacking moral culpability") and the Kerseys' deaths ("spontaneous" and "fortuitous") are merely false premises for a syllogism designed to remove Petitioner's sentence from the bounds of constitutionality. No doubt, the squeezing of a trigger and the resulting high velocity of the bullet takes only a fraction of a second. But to so characterize the physics of a shooting as "spontaneous"—a characterization upon which so much of Petitioner's argument hinges—would be to remove all killings by guns and other highly efficient weapons which produce spontaneous deaths from the imposition of capital punishment for any felony murder. It would also ignore the underlying calculations made by Enmund and other such participants which clearly evidence an intent to allow a killing to occur or to facilitate such a foreseeable outcome. In essence, acceptance of Petitioner's argument requires a nullification of common law principles of criminal responsibility developed over hundreds of years and forces this Court to don the mantle of both legislature and jury in reaching that decision.

Moreover, Petitioner's sentence accords with present societal standards of decency. "Decency" is not synonomous with leniency and the imposition of a capital sentence is not an indication of societal deterioration. All objective indicia demonstrate that society accepts the imposition of capital punishment in appropriate cases of felony murder. Even the legal authority relied upon by Petitioner indicates that his sentence is constitutionally valid. In addition, imposition of capital punishment in appropriate felony murder cases serves both a deterrent and retributive function.

Accordingly, Petitioner's arguments must be rejected.

ARGUMENT

I. A CAPITAL SENTENCE MAY BE PROPERLY IMPOSED FOR FELONY MURDER UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS WITHOUT BEING DISPROPORTIONATE OR EXCESSIVE.

Petitioner's elaborately constructed argument for avoiding his properly imposed capital sentence lacks merit. Under the Eighth and Fourteenth Amendments, "a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering, or (2) is grossly out of proportion to the severity of the crime." *Coker v. Georgia*, 433 U.S. 584, 592 (1977). Accord, *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). The essence of Petitioner's argument is that a capital sentence is unconstitutionally excessive and disproportionate for *any* felony murder conviction absent a finding of specific intent (in the literal sense) to kill. He further contends that he bears no greater moral culpability for his crime in which two deaths occurred than does any other violent criminal in a case in which no death occurred. Petitioner's argument does not withstand analysis.

Nothing in this Court's prior jurisprudence supports reading a specific intent requirement into the Eighth Amendment. The jury and courts below considered all of the evidence of the circumstances of the homicidal act and of Petitioner's character in making their sentencing decision. Therefore, Petitioner was treated as a "unique" individual in accordance with the principles previously announced by this Court. *See Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, No. 80-5727, slip op., (U.S. Sup. Ct. Jan. 19, 1982). Petitioner's characterization of his conduct and the Kerseys' murders are merely premises for a syllogism designed to remove this case from the ambit of principles previously announced by this

Court. Petitioner had a guiding hand in the murder of Thomas and Eunice Kersey. Accordingly, he bears moral and legal responsibility for his criminal actions. His sentence is neither disproportionate nor excessive; it accords with societal standards of decency and serves acceptable criminal punishment goals of society. Hence, the sentence imposed upon Earl Enmund by the Florida jury and courts must be affirmed.

A. Reading A Specific Intent Requirement Into The Eighth Amendment Is Inconsistent With Prevoius Decisions Of This Court.

The State of Florida's felony murder-capital punishment statutory scheme is constitutional as applied to Petitioner, Earl Enmund. His argument—that a capital sentence is *always* unconstitutionally disproportionate to a felony murder conviction, absent a finding of active premeditated specific intent to kill—is not supportable. Rather, an examination of the pertinent decisions demonstrates that the Florida sentencing procedure, which provided for particularized consideration of the circumstances of the homicidal act and the character of the accused, comported with all of the requirements for imposing a valid capital sentence mandated by this Court.

This Court has recognized that it "has never articulated a general constitutional doctrine of *mens rea*." *Powell v. Texas*, 392 U.S. 514, 535 (1968). Rather, it has relied upon "[t]raditional common-law concepts of personal accountability . . ." on the grounds that "[w]e cannot cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his anti-social deeds." [footnote omitted] *Id.* at 535-36.

In *Lockett v. Ohio*, *supra*, this Court considered the validity of a capital sentence for an accomplice in an armed robbery which resulted in a death. Without reaching the question presently at bar, a plurality of this Court held that:

> [T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

438 U.S. at 604 (emphasis in original).

Since the Ohio statute under review permitted consideration of *only* three mitigating circumstances, the statute was unconstitutional. Significantly, the Ohio statute, unlike the Florida statute here, did not permit consideration of individualized circumstances such as the defendant's minor or major role in the offense or age. *Id.* at 606-608. Consideration of those and other mitigating factors are mandated in Florida, see Fla. Stat. Ann. § 921.141(6)(a)-(g), and were in fact considered in the instant case. *Enmund v. Florida*, *supra*, 399 So.2d at 1372-73.

The result is that Petitioner's sentence is not flawed by any of the "constitutional infirmities" found to exist in the sentences in *Lockett*, 438 U.S. at 606-07, or in *Eddings v. Oklahoma*, No. 80-5727, *supra*, slip op. at 8-10. The Florida sentencing authority fully explored the record and weighed any mitigating circumstances. That individual members of this Court might disagree with the weight given the evidence by the courts below does not justify overturning a valid sentence. As Chief Justice Burger recently stated:

> [T]he Constitution does not authorize us to determine whether sentences imposed by state courts are sentences we consider "appropriate"; our only authority is to decide whether they are constitutional under the Eighth Amendment.

Eddings, *supra*, slip op. at 9 (Burger, C.J., dissenting). *See Hutto v. Davis*, No. 81-23 (U.S. Sup. Ct. Jan. 11, 1982).

Justice White filed a separate opinion in *Lockett* in which he urged "that it violates the Eighth Amendment to impose the penalty of death without a finding that the

defendant possessed a purpose to cause the death of the victim." 438 U.S. at 624 (White, J., concurring in part, concurring in judgment, dissenting in part). While the opinion of the plurality in *Lockett* did not find it necessary to reach that question, *id.* at 609 n.16, both Justice Rehnquist and Justice Blackmun addressed the same issue and rejected the proposition advanced by Justice White and by Petitioner here.

Justice Rehnquist stated that:

> I finally reject the proposition urged by my Brother White in his separate opinion, which the plurality finds it unnecessary to reach. That claim is that the death penalty, as applied to one who participated in this murder as Lockett did, is "disproportionate" and therefore violative of the Eighth and Fourteenth Amendments. I know of no principle embodied in those Amendments, other than perhaps one's personal notion of what is a fitting punishment for a crime, which would allow this Court to hold the death penalty imposed upon her unconstitutional because under the judge's charge to the jury the latter were not required to find that she intended to cause the death of her victim. As my Brother White concedes, approximately half of the States "have not legislatively foreclosed the possibility of imposing the death penalty upon those who do not intend to cause death." Ante, at 625, 57 L.Ed.2d, at 1002. Centuries of common law doctrine establishing the felony-murder doctrine, dealing with the relationship between aiders and abettors and principals, would have to be rejected to adopt this view. Just as surely as many thoughtful moralists and penologists would reject the Biblical notion of "an eye for an eye, a tooth for a tooth," as a guide for minimum sentencing, there is nothing in the prohibition against cruel and unusual punishments contained in the Eighth Amendment which sets that injunction as a limitation on the maximum sentence which society may impose.

Id. at 635-36 (Rehnquist, J., dissenting).

Similarly, Justice Blackmun, concurring in part and in the judgment, refused to embrace in *Lockett* the "bright

line" argument now urged by Petitioner. Rather, in terms which are consistent with *Powell, supra*, and instructive here, Justice Blackmun rejected the proposition that capital punishment may never be imposed for felony murder after examining the jurisprudential and practical difficulties of such a rule:

> I do not find entirely convincing the disproportionality rule embraced by my Brother White. *The rule that a defendant must have had actual intent to kill, in order to be capitally sentenced, does not explain why such intent is the sole criterion of culpability for Eighth Amendment purposes.* What if a defendant personally commits the act proximately causing death by pointing a loaded gun at the robbery victim, verbally threatens to use fatal force, admittedly does not intend to cause a death, yet knowingly creates a high probability that the gun will discharge accidentally? What if a robbery participant, in order to avoid capture or even for wanton sport, personally and deliberately uses grave physical force with conscious intent to inflict serious bodily harm, but not to kill, and a death results? *May we as judges say that for Eighth Amendment purposes the absence of a "conscious purpose of producing death"* [citation omitted] *transforms the culpability of those defendants' actions?*
>
> *Applying a requirement of actual intent to kill to defendants not immediately involved in the physical act causing death, moreover, would run aground on intricate definitional problems attending a felony murder.* What intention may a State attribute to a robbery participant who sits in the getaway car, knows that a loaded gun will be brandished by his companion in the robbery inside the store, is willing to have the gun fired if necessary to make an escape but not to accomplish the robbery, when the victim is shot by the companion even though not necessary for escape? What if the unarmed participant stands immediately inside the store as a lookout, intends that a loaded gun merely be brandished, but never bothered to discuss with the triggerman what lim-

itations were appropriate for the firing of the gun? What if the same lookout personally intended that the gun never be fired, but, after his companion fires a fatal shot to prevent the victim from sounding an alarm, approves and takes off?

> *The requirement of the actual intent to kill in order to inflict the death penalty would require this Court to impose upon the States an elaborate "constitutionalized" definition of the requisite mens rea, involving myriad problems of line drawing that normally are left to jury discretion but that, in disproportionality analysis, have to be decided as issues of law, and interfering with the substantive categories of the States' criminal law.* And such a rule, even if workable, is an incomplete method of ascertaining culpability for Eighth Amendment purposes, which necessarily is a more subtle mixture of action, inaction, and degrees of mens rea.

438 U.S. at 614-15 n.2 (Blackmun, J., concurring in part and concurring in judgment) (emphasis added).

Justice Blackmun's assessment of the difficulties of a bright line rule requiring specific intent led him to the conclusion, also reached implicitly by the plurality, that:

> *The more manageable alternative,* in my view, *is to follow a proceduralist tack, and require,* as Ohio does not, in the case of a nontrigger man such as Lockett, *that the sentencing authority have discretion to consider the degree of the defendant's participation in the acts leading to the homicide and the character of the defendant's mens rea.* That approach does not interfere with the State's individual statutory categories for assessing legal liability but merely requires that the sentencing authority be permitted to weigh any available evidence, adduced at trial or at the sentencing hearing, concerning the defendant's degree of participation in the homicide and the nature of his mens rea in regard to the commission of the homicidal act. A defendant would be permitted to adduce evidence, if any be available, that he had little or no reason to anticipate that a gun would be fired, or that he played only a minor part

> in the course of events leading to the use of fatal force.

438 U.S. at 615-16 (emphasis added).

Thus, it is implicit in the various opinions in *Lockett* that a capital sentence is constitutionally valid in felony murder cases as long as any mitigating factors related to the crime itself or the individual defendant may be admitted for consideration of the appropriate sentence. Such a conclusion comports with this Court's Eighth Amendment jurisprudence which has consistently focused upon individual culpability as demonstrated by the characteristics of the particular offense and the particular offender. *See e.g., Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts (Harry) v. Louisiana*, 431 U.S. 633 (1977); *Coker v. Georgia*, 433 U.S. 584 (1977).

Florida's felony murder-capital punishment statutory scheme fits within this constitutional framework. As stated by the *Lockett* Court:

> That states have authority to make aiders and abettors equally responsible, as a matter of law, with principals, or to enact felony murder statutes is beyond constitutional challenge.

438 U.S. at 602.

Moreover the constitutional validity of Florida's procedure for imposing capital punishment was approved in *Proffit v. Florida*, 428 U.S. 424 (1976). In the context of the case at bar, the procedure employed in sentencing Petitioner passes constitutional muster since it provides for particularized consideration of the homicidal act and of Earl Enmund's character. Both channels of inquiry were explored below thereby assuring that Petitioner's sentence was not arbitrarily or harshly imposed. Petitioner's sentence is constitutionally valid notwithstanding his attempt to read a specific intent requirement into the Eighth Amendment. Any other conclusion intimates a rejection of the capital sentencing principles previously laid down by this Court.

B. Accepting Petitioner's Characterization Of His Conduct And The Kerseys' Murders Requires The Nullification Of Common Law Principles Of Criminal Responsibility Developed Over Hundreds Of Years.

Acceptance of Petitioner's claims would not only require another reinterpretation or rejection of the principles previously announced by this Court in death penalty cases, but the nullification of common law principles of criminal responsibility developed over hundreds of years. Since such a decision would place this Court in the position of both a super-legislature and a super-jury as well as deny the States the practical ability to decide criminal matters of State concern, the public interest demands that Petitioner's attempts to avoid his sentence be rejected.

Petitioner's characterization of the Kerseys' murders and his role in them has a surreal quality. Throughout his brief, Petitioner repeatedly denies "individual and personal culpability" for the deaths of the Kerseys which are characterized as a mere "spontaneous" "fortuity". Brief of Pet. at 9, 14, 37.[1] Petitioner argues that "he did not . . . intend to take life, or contemplate that it would be taken by another." Hence, his guilt is "technical" and he cannot be subject to a capital sentence.

The Washington Legal Foundation submits that Petitioner's contentions have no merit and only serve to highlight the moral frame of reference he brings to this case. To say that one may conspire with others to rob an elderly couple, go about the commission of that robbery armed with deadly weapons, and yet escape liability for any

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[1] Note that Petitioner does reluctantly admit at one point in his comparison of the enormity of his crime to that of Ehrlich Coker's that:

> Coker and petitioner both committed serious felonies that do not contemplate the taking of human life. *Both thereby created a risk . . . that by setting in train a series of events, the death of another person might result.* Fortunately, in Coker's case the risk did not materialize. In petitioner's case it did.

Brief of Pet. at 17 (emphasis added).

ensuing deaths is to view the victims as mere "objects to be toyed with and discarded." *Coker v. Georgia*, 433 U.S. at 616 (Burger, C.J., dissenting).

Our system of justice has always been grounded in individual responsibility. Responsibility and moral culpability extend to situations in which an individual has played an integral role in creating a situation in which violence may occur, supplied the means for the violence to occur, and then enjoyed the illegal fruits of the violence once it has occurred. In brief, one is presumed to intend the natural, reasonable, and probable consequences of his voluntary acts including a criminal enterprise in which he is the guiding hand.

To claim, then, as Petitioner does, that such an individual bears no moral culpability for the foreseeable result of his conduct turns our traditional concepts of criminal responsibility on their head. Petitioner fails to differentiate legal intent and legal causation from their literal and physical meanings.

Even a superficial examination of his arguments demonstrates that they are merely the necessary premises for a syllogism designed to bring his case within the constitutional ambit of *Coker v. Georgia*, *supra*. In essence, Petitioner is stating: "Since I did not physically cause death, I cannot be sentenced to death myself." However, Petitioner ignores the fundamental difference between his case and Coker's; death occurred here. That it does not always occur when a risk is created is not constitutionally significant in cases in which it does.

Enmund's repeated reference to the murders of Thomas and Eunice Kersey as a mere "fortuity" is a ghoulish insult to their memory. The murders of Mr. and Mrs. Kersey were no "fortuity"; they were the direct and foreseeable result of a plan to commit robbery with loaded firearms. Petitioner decided to rob Mr. Kersey at the time he purchased the calf from him. All he needed was help in carrying out his plan. Earl Enmund wanted Tom Kersey's money and was prepared to get it at any cost.

Any cost, that is, short of bearing legal responsibility for his illegal conduct.

The fact of the matter is that the Kerseys are dead. The State of Florida may therefore sentence Petitioner to death since it complied with the guidelines set forth by this Court in its previous capital decisions. That the State has discretion to include capital punishment as a potential penalty for felony murder should be beyond question. If the question is open at all, it is only open to the legislatures of the various States as this Court has repeatedly recognized. A bright line distinction to the contrary by this Court will deny the States their rightful authority and ability to protect their citizens.

C. Petitioner's Sentence Accords With Societal Standards Of Decency.

Petitioner's sentence accords with "the evolving standards of decency which mark the progress of a maturing society." *Gregg v. Georgia*, 428 U.S. 153, 190 (1976); *quoting Witherspoon v. Illinois*, 391 U.S. 510 n.15 (1968), and *Trop v. Dulles*, 356 U.S. 86, 101 (1958); *Coker, supra*, 433 U.S. at 603 (Powell, J., concurring). As an initial matter, it must be noted that invocation of the phrase "evolving standards of decency" does not automatically imply a departure from utilizing capital punishment. An examination of a number of relevant factors indicates that societal standards comprehend the imposition of capital punishment for felony murder. Capital punishment has been traditionally available in all appropriate cases including felony murder cases. Surprisingly, the authority cited by Petitioner to support his case buttresses the conclusion that his sentence is constitutionally valid. Hence, prohibiting capital punishment in all felony murder cases does not accord with society's evolving standards of decency.

1. *The phrase "evolving standards of decency" does not automatically imply a departure from imposing capital sentences.*

It is important to state at the outset, however obvious the proposition may seem, that invocation of the concept of "evolving standards of decency" does not automatically imply a departure from imposing capital sentences. "Decency" is not synonomous with leniency and an increased use of capital sentences is not synonomous with societal deterioration. In fact, the Washington Legal Foundation submits the opposite is true.

In his brief, Petitioner adopts a tone of moral superiority that admits no doubt that the standards of our mature society have evolved such that the only "decent" course available is to prohibit capital sentences for criminals like Enmund. WLF is not surprised that Petitioner strikes this false note of "victimization," but this Court should reject that notion. It has become increasingly common in our society for criminals to reverse the roles and claim themselves the "victim" and society the "criminal" responsible for their illegal acts. That Petitioner can make such a claim at all with a reasonable hope that it will be favorably received by this or any other court demonstrates the extent to which the focus of the criminal justice system has been distorted. WLF submits that while our society may not believe that *all* major felonies, standing alone, justify a capital sentence, it is not true that our society will become "more decent" if this Court abolishes the *potential* for a death sentence in all cases in which a felony results in death.

2. *Objective indicia indicate that society accepts capital punishment for felony murder in appropriate cases.*

Objective indicia of societal standards do not reveal a rejection of capital sentences for all cases of felony murder. Rather, they indicate that a large segment of society has concluded that capital punishment is necessary under certain circumstances.

Amicus submits that contemporary attitudes toward capital punishment clearly support the affirmance of Petitioner's sentence. Thirty-seven (37) State legislatures, the bodies "constituted to respond to the will and consequently the moral values of the people," have enacted capital punishment statutes since this Court's decision in *Furman v. Georgia*, 408 U.S. 238, 383 (Burger, C.J., dissenting) (1972). *See National Law Journal*, "Death Row Census Growing as Legal Challenges Continue," January 18, 1982 at 4, col. 2. While Petitioner contends that only eight (8) jurisdictions join Florida in expressly permitting a capital sentence in cases such as the instant one, Justices White, Blackmun, and Rehnquist all noted in *Lockett, supra*, that "approximately half of the States 'have not legislatively foreclosed the possibility of imposing the death penalty upon one who did not intend to cause death.'" 438 U.S. at 635. Yet, there are indications that twenty-six (26) States by actual count allow a capital sentence for an aider and abettor without proof of specific intent to cause the murder. *See* Brief of Respondent at ——. Thus, contemporary legislative judgments do not demonstrate the type of mass rejection of capital punishment for felony murder which would justify this Court's interference.

Similarly, Petitioner's reliance on a variety of statistics relating to jury determinations is sorely misplaced. The statistics submitted by Petitioner bring to mind a statement attributed to Benjamin Disraeli: "There are three kinds of lies in this world: lies, damned lies and statistics."

Like Justice Blackmun in *Lockett, supra*, *Amicus*

> must question the data relied upon by my Brother White [and offered again in the instant case, as it was in *Lockett*, by Counsel for Petitioner, Pet. Brief at 33-34] that only 'extremely rare[ly] has the death penalty been used when a defendant did not specifically intend the death of the victim. The representation made by petitioner Lockett, even if accept-

> ed uncritically, was merely that of 363 reported cases involving executions from 1954 to 1976, in 347 the defendant "personally committed a homicidal assault"—not that the defendant had actual intention to kill.

438 U.S. at 615 n.2.

Other statistics relied upon by Petitioner are also suspect. His accounting of the statistics available for the criminals on death row as of October 21, 1980 can be read to support the arguments of Respondent as well. Brief of Pet. at 35. For example, Petitioner states that "[o]f the 739 for whom sufficient data are available . . . only 41 did not personally participate in the fatal assault upon the victim." *Id.* In the first instance, the statistics seem to represent a rejection of capital punishment for those who do not actually pull the trigger. But yet they can also be read to represent society's willingness, when circumstances warrant, to impose capital punishment in a substantial number of cases on criminals who did not "pull the trigger," but who are nonetheless responsible for the deaths which result from their illegal acts.

WLF reads those statistics in the latter fashion and finds support for its conclusion in public opinion surveys. Public opinion polls not only demonstrate that a broad segment of our society supports capital punishment for murder, but for various other crimes as well. A 1966 poll found that 42 percent of those polled favored capital punishment while 11 percent had no opinion and 47 percent opposed it. A 1969 poll, however, indicated 51 percent in favor, 9 percent with no opinion, and 40 percent opposed. Erskine, *The Polls: Capital Punishment*, 34 Public Opinion Quarterly 290 (1970). By 1973, 59 percent favored the death penalty with 31 percent opposed, while by 1977, 67 percent were in favor and only 25 percent opposed. U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS at 199 (1980).

More importantly for present purposes, a 1981 survey conducted by *Time* magazine indicates that 73 percent of

the American public "approve the *wider use of the death penalty for such crimes as hijacking* or killing a police officer." *Time*, June 1, 1981 at 13, col. 3 (emphasis added). It is particularly telling that approval was voiced for employing capital punishment as a possible penalty for hijacking, a crime which does *not* usually result in any one's death or injury. *See also*, Field Newspaper Syndicate, "The Gallup Poll: Support for Death Penalty Greatest In 28 Years," (March 1, 1981).

WLF believes that the poll reflects society's recognition of the high degree of risk created by some crimes in which death does not always result and the concomitant need to have severe penalties available for them. Thus, objective evidence demonstrates that our mature society believes that capital punishment should at least be available as a sanction in felony murder cases.

3. *Legal authority relied upon by Petitioner buttresses* the conclusion that his sentence is constitutionally valid.

An objective examination of the legal authority relied upon by Petitioner supports the conclusion that Earl Enmund's sentence is constitutionally valid. In arguing that society rejects capital punishment for felony murder, Petitioner relies in part on the American Law Institute's Model Penal Code (MPC) and a number of State cases. However, Petitioner's sentence would be affirmed under the reasoning of the MPC or the State cases.

Petitioner's brief is peppered with references to the 1980 Official Draft and Revised Comments of the MPC, particularly the "murder" provision, § 210. His arguments would lead this Court to believe that the drafters of the Model Penal Code have rejected capital punishment for felony murder. Such a belief would be mistaken.

In laboring to *adapt* the traditional common law doctrine of felony-murder to the realities of contemporary American society, the drafters of the MPC attempted to advance a "new approach" to the problem of homicide

occurring in the course of a felony. They formulated the following language to prevent an accomplice to a crime of the kind usually included in first degree felony-murder from escaping a murder conviction:

> (1) Except as provided in Section 210.3 (1) (b), criminal homicide constitutes murder when:
>
> (a) it is committed purposely or knowingly; or
>
> (b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape.
>
> (2) Murder is a felony of the first degree [but a person convicted of murder may be sentenced to death, as provided in Section 210.6].

ALI, MODEL PENAL CODE, § 210.2.

In the drafters' own words:

> Subsection (1) (b) creates a presumption of the required recklessness [which will constitute murder] . . . if a homicide occurs during the commission or attempted commission of robbery, ... The presumption also arises . . . *if he is an accomplice to the commission of one of the specified crimes when the killing takes place.*

ALI, MODEL PENAL CODE, § 210.2, Comments, at 29-30 (1980) (emphasis added).

The effect of the MPC, therefore, is to abandon felony murder as a separate basis for establishing liability for homicide and to retain the presumption described above as a means of facilitating proof.

The drafters conclude that under the felony murder doctrine:

> . . . it remains indefensible in principle to use the sanctions that the law employs to deal with murder *unless* there is at least a finding that the actor's con-

> duct manifested an extreme indifference to the value of human life. [Nevertheless] [t]he fact that the actor was engaged in a crime of the kind that is included in the usual first-degree felony-murder enumeration, will frequently justify such a finding. *The result may not differ often under such a formulation from that which would be reached under some form of the felony-murder rule.*

ALI, MODEL PENAL CODE, § 210.2, Comments, at 38-39 (1980) (emphasis added).

Assuming, *arguendo*, that the MPC had been in place in lieu of the Florida statutory scheme under which Enmund was sentenced, there is no reason to believe that Petitioner would not have been guilty of first degree murder. On the contrary, given the jury's findings as well as those of the Florida Supreme Court that Petitioner's participation in the crime was "major," the conclusion is equally inescapable that the jury would also have found that Enmund perceived and consciously disregarded the risk of death of the Kerseys and was "reckless" within the meaning of 210.2(1)(b). A finding of murder in the first degree would therefore not be anomalous under the MPC.

Similarly, Petitioner could be sentenced to death under the MPC, § 210.2(2), as long as the requirements of § 210.6 of the MPC were satisfied. A comparison of § 210.6 with the procedures employed in the Florida court reveal that they are nearly identical; a separate proceeding was conducted and both mitigating and aggravating circumstances were examined.

The State court decisions cited by Petitioner also demonstrate that his sentence should be affirmed. For example, he relies upon three cases drawn from "jurisdictions . . . with well-established pre-*Furman* traditions of appellate review of capital sentences" for the proposition that even these courts recognized that "death sentences should be reduced in cases in which (i) there was not a strong showing of premeditation, or (ii) the offender was not the actual perpetrator of the homicide." Brief of Pet.

at 24 n.37, *citing*, *State v. Hall*, 176 Neb. 295, 125 N.W. 2d 918 (1964); *Wesley v. State*, 112 Neb. 360, 199 N.W. 719 (1924); *Fritz v. State*, 8 Okla. Cir. 342, 128 Pac. 170 (1917). *See also*, cases cited in Brief of Pet. at 36-37 n.55. Even a cursory reading of these cases reveals that they do not support the broad proposition advanced.

While space considerations prohibit a case-by-case accounting of all these decisions, it is instructive to examine a few. In *State v. Hall*, *supra*, the court reduced a capital sentence based upon:

> Consideration of all of the circumstances, that is, the age of the defendant, that he is a feebleminded person, a low-grade moron or a high-grade imbecile, passive in nature, possessed of a disposition to follow the lead of others, and who previously had no offense charged against him. . . .

125 N.W.2d at 927.

Similarly, the court in *Wesley v. State*, *supra*, found that the defendant was younger than his co-felons, had previously been a law-abiding citizen, and the robbery had been the suggestion of another.

The instant case is entirely different. The idea to rob the Kerseys was Earl Enmund's. He was the prime mover in the conspiracy that carried out that idea. At 44 years of age, Petitioner was older than his co-felons. He had a prior record of violent crime. A reasonable inference may be drawn from the record that he supplied at least one of the murder weapons and it was proven that he ordered the disposal of the weapons to avoid detection.

In short, the Florida courts, like the courts in the cases cited by Petitioner, considered a wide range of circumstances which are unique to Petitioner's case and character. Nonetheless, they concluded that in Petitioner's case a capital sentence was warranted. This Court can only overturn that judgment by substituting its personal view of the facts for the factual determination of the jury and lower courts.

Finally, it is worth noting that in *Fritz v. State*, *supra*, the court reduced the sentence to life at hard labor. The

court's statement in reaching that decision is even more noteworthy, however:

> [W]e do not wish to be understood as being in favor of abolishing capital punishment as a penalty for murder. We think that capital punishment, at the discretion of the jury, as the penalty of murder, is essential, to the security of society, and we have no sympathy with that sentimental humanitarianism which in the exercise of a mawkish sympathy for a heartless, unfeeling felonious assassin forgets and wholly ignores the innocent murdered victim and the necessary safeguards of society. If capital punishment should be abolished without some limitation of the pardoning power in convictions of murder and manslaughter, and the indiscriminate exercise of the pardoning power in this character of conviction should continue, it cannot be doubted that convictions of murder and manslaughter in this state would then in many cases be but a mere mockery of law and justice.

128 Pac. at 171.

Amen!

D. Deterrence And Retributive Justice Are Measurably Served By The Imposition Of Capital Punishment For Felony Murders.

Petitioner also argues that capital punishment does not serve the well-recognized social goals of deterrence and retribution. Brief of Pet. at 38-45. *Amicus* strongly rejects that argument and submits that deterrence and retributive justice are advanced by the imposition of capital punishment on felony murderers.

1. *Imposing capital punishment for felony murders will have a deterrent effect on the commission of both felonies and murder.*

Amicus submits that the imposition of the death penalty will actually have a deterrent effect on the commission of future felonies and hence, felony murders, and thus result in a *saving* of innocent lives. Because of the breakdown of our current criminal justice system, a reasonable

perception exists that the costs of engaging in criminal conduct is low when compared to the benefits derived from the criminal activity. When the benefits outweigh the costs, or even appear to, one can fairly predict a rise in criminal conduct. In short, crime *does* pay. See North & Miller, THE ECONOMICS OF PUBLIC ISSUES 163 (1980).

However, calculating criminals like Enmund would think twice about aiding or abetting the commission of a felony if this Court were to uphold the death penalty for cases such as this. They would know that if one of their group were to kill the victim in the commission of the crime, *all* could suffer the dire consequences of their collective action, even if a specific intent to kill were not actually formulated. Consequently, there would be a marked decrease in the commission of all underlying felonies since a felony murder situation usually contemplates the participation of two or more persons for the successful completion of the underlying felony (*e.g.*, a person to serve as a lookout, get-away driver, etc.). Without the necessary participants in the felony, the original organizer is likely to abandon his plans.[2] Thus, not only will the commission of all such felonies decrease, but also

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[2] Felony murder is also possible where a felon, acting alone, accidentally kills someone during the course of the felony. Even if he did not specifically intend to kill, capital punishment would no doubt deter criminals from carrying lethal weapons during the commission of a felony or from committing the felony at all.

If two or more persons are contemplated for the commission of a felony, the organizer of a felony may try to convince his co-conspirators to help him carry out his felonious plans by not using lethal weapons, thereby offering his accomplice or accomplices some assurance that a felony murder will not occur. In such a case, society benefits because less victims will be killed. If the organizer fails to convince his potential abettors to help him commit the felony, and if he decides instead to "go it alone" or with a reduced number of accomplices, the likelihood of detection and apprehension by law inforcement authorities increases because of the missing "lookout" accomplice or other person vital to the felonious plan. Again, society benefits from the deterrent effect of the threat of capital punishment.

there will be a net saving of innocent lives in those percentage of felonies where someone is killed.[3] For an excellent analysis of the deterrent effect of capital punishment on murder and felony murder, see Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AMERICAN ECONOMIC REVIEW 397, 400 (1975).

Amicus also takes exception to Petitioner's argument that only a small percentage (approximately .5 percent) of all felonies actually result in murder. Pet. Brief at 40-41, n.60. Petitioner's statistics are woefully outdated and undervalued by *3-5,000 percent.* The percentage of murders committed during the course of a felony for 1980 was 17.7 percent of the 21,860 total murders committed; 16.9 percent of 20,591 murders in 1979; 16.7 percent of 18,714 in 1978; 16.7 percent of 18,033 in 1977; and 17.7 percent of 16,605 in 1976. U.S. DEPT. OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES-1980 at 13 (1981). If you add to that percentage the additional 6 or 7 percent of murders committed in the course of a suspected felony, the result is that approximately *25 percent of all murders are felony murders. Id.*

Even if one were to use the conservative 17 percent figure, we are still talking about over 3,000 felony murders annually. How many of those 3,000 lives would be saved if capital punishment for felony murders was not only authorized, but carried out, is hard to say. But the Washington Legal Foundation believes that the deterrent effect argument is a valid one and, indeed, a humanitarian one because its purpose is to save lives. If capital punishment has no deterrent effect, it would be interesting to see what the felony murder rate would be if the punishment were reduced to a fine or brief incarceration.

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[3] It must be remembered that these felony murder type situations are not sponteneous "crimes of passion" where one might question the deterrent value of the death penalty.

2. *Retributive justice is served by punishing petitioner's felony murder with death.*

Petitioner Enmund's participation in the brutal killing and robbery of Mr. and Mrs. Kersey was major. Enmund planned the crime, was aware that dangerous weapons would be used in its commission, drove the get-away vehicle immediately following the murders, and directed the attempt to avoid detection by disposing of the murder weapons. To argue, therefore, that the death sentence imposed upon him by the Florida jury lacks any "retributive justification" wilfully misconceives both the nature of retribution and Petitioner's own high degree of moral culpability in the murders.

Petitioner is correct when he cites several authorities for the proposition that: "[t]he retributive theory presupposes moral guilt", and "rests on the idea that . . . because man is responsible for his acts, he ought to receive his just deserts." Brief of Pet. at 42. Rather than develop these vague generalities, however, Petitioner is content to leave the Court with an incomplete understanding of what the purpose of retributive justice is in a case such as the one at bar. Instead, he immediately shifts his focus to a discussion of mens rea and tells us his precise subjective state of mind at the time of the slayings. Retribution, however, entails much more in addition to one's moral culpability or lack thereof.

The retributive theory of justice is unquestionably the view most prevalently adhered to by the general public and its representatives. "To say that support for this view of punishment is widespread among leaders in the judiciary and in government is almost an understatement." B. Cavanaugh, "The Justification for Punishment," 16 *Alberta Law Review* 43 (1978).

Retribution is properly described as punishment in its purest form: "[t]he principal end of punishment in a retributionary scheme is to annul wrong and thereby vindicate right . . . . The injury to be annulled by punishment is not the determinate injury done to the victim but

the noumenal injury done to the moral order. Hence the measure of punishment is properly derived not from the qualitative or quantitative aspects of the crime (as in revenge) but from its moral significance" with "the severity of punishment . . . depend[ing] upon the perceived magnitude of the threat that the crime poses to the reality of human dignity." A. Brudner, "Retributivism and the Death Penalty," 30 UNIV. TORONTO L.J. 337, 350, 354 (1980). In the present instance, the wrong sought to be annulled through the imposition of the death sentence is obvious. Enmund is being punished for having planned and participated in the robbery of two elderly people whom he had reason to believe might resist and as to whose anticipated resistance he made allowance by having his co-conspirators come armed with deadly weapons.

Let us be clear on this point: Enmund planned the violent robbery of the Kerseys and thereby created the situation which led to their deaths. To argue, therefore, that Petitioner had no intent to kill because he was the driver of the get-away car flies in the face of the uncontroverted facts and is an insult to this Court. Determining the state of mind of any individual is always difficult. To do so, one cannot rely merely upon a defendant's after-the-fact statements. The jury, of course, considers those statements as they did in the instant case. More importantly, however, the jury views the facts and what one may be presumed to intend given the probable consequence of one's voluntary acts. In this case, the intent to kill was found not merely through a "strict liability" application of the Florida felony murder statute as Petitioner would have this Court believe, but from the fact that the killing was a natural and probable consequence of the conspiratorial acts which Enmund initiated and orchestrated.

Retribution is indeed that which is deserved. It led the Florida jury to the inexorable conclusion that the fundamental respect for human dignity, the dignity of the Kerseys as well as Petitioner, must lead to the death of the man who pulled the strings of the criminals who killed them.

II. RECOGNITION OF THIS COURT'S PROPER ROLE AND A RESPECT FOR THE VALUE OF HUMAN LIFE DICTATE THAT PETITIONER'S SENTENCE BE AFFIRMED.

Throughout its brief, *amicus curiae* Washington Legal Foundation has addressed the subject of this Court's proper role in death penalty cases and the dignity of human life. Nonetheless, the history of death penalty jurisprudence, including very recent history, suggests that further discussion is in order.

The Court's acknowledgements that capital punishment is constitutional and that its imposition is a factual matter properly left to legislatures and juries are too numerous to require repetitive citation here. Mere repetition of a principle cannot endow it with substance when its practical application is not forthcoming. While this Court continues to voice a recognition of its proper role in capital cases in print, it continues to carve out exceptions to imposing death sentences in practice.

Amicus suggests that in doing so, this Court is too often merely substituting its judgment for that of a legislature, a jury, or both. For example, the statement of the majority in *Eddings v. Oklahoma*, *supra*, slip op. at 12, that "*We do not weigh the evidence for* [the state courts]" is belied by the lengthy proceeding evaluation of the evidence which leaves little doubt as to the manner in which the Court expects the case to be decided on remand. This Court should not follow a similar course in the case at bar.

Even aside from the obvious impact that such judicial action has on public confidence in this Court and the criminal justice system, another more important effect must be considered. The acceptance of heinous violent crime by social authority anesthetizes all of society to its brutality. As social authority becomes less willing to pass any irrevocable judgment in cases in which the lives of law-abiding citizens are taken, respect for the value of human life itself is diminished. In essence, life becomes

less valuable as authority becomes less willing to severely sanction criminal conduct.

This Court bears an obvious and heavy responsibility in capital cases. Yet it is society that suffers the consequences of the failure to meet that responsibility. The Washington Legal Foundation submits that the respect for human dignity so often referred to by this Court should be extended to the victims of crime and the law-abiding public.

CONCLUSION

For all of the reasons stated above, the Washington Legal Foundation submits that Petitioner's sentence is constitutional and must be affirmed.

Respectfully submitted,

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